

NAVAJO REFINING CO.

IBLA 99-177

Decided May 20, 1999

Appeal from a decision of the Assistant Field Manager, Division of Lands and Minerals, Albuquerque Field Office, Bureau of Land Management, denying right-of-way application NMNM 100227.

Affirmed.

1. Rights-of-Way: Act of February 25, 1920—Rights-of-Way: Applications—Rights-of-Way: Oil and Gas Pipelines

A BLM decision rejecting an application for a right-of-way under 30 U.S.C. § 185 (1994), is an exercise of discretion that will be affirmed on appeal when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and where no sufficient reason to disturb the decision is shown.

2. Mineral Leasing Act—Rights-of-Way: Generally—Rules of Practice: Appeals: Burden of Proof

The burden is on a right-of-way applicant, who challenges a BLM decision denying its application, to demonstrate by a preponderance of the evidence that BLM erred in the evaluation of data from agency heads that control Federal lands supporting rejection, and in its conclusions.

APPEARANCES: Joel M. Carson, Esq., Artesia, New Mexico, for Appellant; John LaBry, Tijeras, New Mexico, for Intervenor EMRAP.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Navajo Refining Company (Navajo or Appellant) has appealed from a December 16, 1998, decision of the Assistant Field Manager, Division of Lands and Minerals, Albuquerque Field Office, Bureau of Land Management (BLM), denying right-of-way (ROW) application NMNM 100227 to Navajo to construct a steel pipeline, approximately 32 miles in length, to transport petroleum products from Moriarty, New Mexico, to Albuquerque, New Mexico.

The principal reason for denial was the opposition of both the U.S. Forest Service (USFS) and the U.S. Air Force (Air Force), across whose lands the proposed ROW would traverse.

The proposed route of the pipeline would cross private lands (1/3 of length) in the East Mountain area, and 2/3 of the proposed length would cross public lands managed by the Cibola National Forest, Kirtland Air Force Base, and the Department of Energy. BLM involvement, although minimal, is required because 43 C.F.R. § 2882.2-2(b) directs that ROW applications be filed with BLM where more than one Federal agency is involved. The Board denied Appellant's Request for Stay of the BLM decision on March 5, 1999.

The USFS objections to the proposed ROW are set forth in a November 24, 1998, letter from Liz Agpaoa, Forest Supervisor, to the New Mexico State Director, BLM (USFS letter). That letter states, in pertinent part:

The Cibola National Forest Plan, as amended, established Forestwide Standards and Guidelines that provided direction to designate existing oil and gas transmission rights-of-way as corridors. We note the proposed route is not within an existing corridor and as such would require an amendment to the Forest Plan. Furthermore, we do not believe the proposed route is an appropriate use for the area within our present management activities and decline to entertain an option outside an established corridor.

(USFS letter at 1.)

Air Force objections were lodged in a November 24, 1998, letter (Air Force letter) from Colonel Gary Dills, U.S. Air Force, Commander, 377th Air Base Wing, Kirtland Air Force Base, to the New Mexico State Director, BLM. Colonel Dills' letter stated, in pertinent part:

1. This letter is to notify the Bureau of Land Management (BLM) to deny the right-of-way for the proposed project through Kirtland Air Force Base (AFB). The proposed pipeline by Navajo Pipeline Inc., is incompatible with our military mission.

2. After review and consideration of the proposed pipeline project, my staff has concluded that the proposal would create unnecessary risks to the operational missions currently ongoing at Kirtland, AFB. To approve the right-of-way for this pipeline would reduce the military value of the installation, and in the interest of national defense, we cannot allow this to happen. Therefore, I would recommend that BLM notify Navajo Pipeline Inc., that this project is disapproved for right-of-way through Kirtland AFB.

(Air Force letter at 1.)

In the Assistant Field Manager's Decision (Decision) of December 16, 1998, BLM stated, in pertinent part:

The regulations at 43 CFR 2882.3(e), indicate that an application for a ROW grant which meets the requirements of the Mineral Leasing Act of 1920 (30 U.S.C. 185) entitles the applicant only to a full review of the application. However, the application may be denied if the authorized officer (in consultation with the other appropriate agencies) determines that the ROW applied for would be inconsistent with the purpose to which the federal lands involved have been committed, or would otherwise not be in the public interest.

The BLM has received letters from the Forest Service and from Kirtland AFB, both dated November 24, 1998. The Cibola National Forest indicated the Row application is not an appropriate use for the area within their present management planning, and refuses to entertain a proposal outside established utility corridors, as this proposal would be. Kirtland AFB indicated that the proposal is incompatible with their mission and would create unnecessary risks to their operations, and requested BLM to deny the ROW. Consequently, there is no need to conduct an environmental analysis, since this proposal is inconsistent with the missions of these two agencies.

Since application NMNM 100227 for the proposed ROW is inconsistent with the purpose for which these federal lands are being managed, the application is hereby rejected in its entirety. The rejection of this application constitutes a final decision by the BLM in this matter.

(Decision at 1-2.)

In its Statement of Reasons (SOR) for appeal, Appellant provides the following points in support of its request for reversal of the BLM decision:

1. Navajo is a pipeline company which controls a pipeline which transports petroleum products, including gasoline, diesel, and jet fuel, from its refinery in Artesia, New Mexico to various places in New Mexico.
2. Navajo intends to build a pipeline from its transmission line near Moriarty, New Mexico across private lands, United States Forest Service ("USFS") lands, and Kirtland Air Force Base ("Kirtland"), and thence to its storage tanks on South Broadway in Albuquerque, New Mexico.
3. Navajo also intends to supply military jet fuel to Kirtland through the pipeline.

4. In April of 1998, Navajo applied for a ROW across federal lands, including lands under the USFS, the Department of Defense at Kirtland, and the Department of Energy.

5. In order to comply with federal law, certain studies are required under the National Environmental Policy Act ("NEPA") before the ROW can be issued.

6. Navajo met with Kirtland and after this meeting was led to believe that its pipeline could be built across Kirtland along a route prescribed by Kirtland without adversely affecting the operation of Kirtland.

7. Navajo was also led to believe that the building of a pipeline, which, among other things, was capable of providing jet fuel to Kirtland, would be beneficial to Kirtland.

8. NEPA requires a lead agency to supervise the various studies that must be made to determine the location of the ROW, as well as restrictions on where the pipeline should be built and to ensure compliance with other laws so that the ROW when granted will conform to the goals of NEPA.

9. Kirtland volunteered to be lead agency, but for reasons unknown to Navajo withdrew and stated it would not be lead agency.

10. Both the Bureau of Land Management ("BLM") and USFS also declined to be lead agency for reasons stated in the Rejection for Application for ROW.

11. Neither Kirtland nor the USFS has ever notified Navajo directly of the rejection of its request for a ROW across lands governed by them, and Navajo believes that the reasons for rejection given in the Decision are arbitrary, capricious, contrary to law, and also are based upon their unwillingness to fulfill duties placed upon them by law, which is also contrary to law, and deny Navajo due process of law contrary to the United States Constitution.

12. Navajo has offered to pay for the cost of contractors answerable to the lead agency to conduct the studies required by NEPA so that out-of-pocket expenses to Kirtland, USFS, or the BLM will be reduced.

13. The decisions of both Kirtland and USFS are not based upon a substantial and serious investigation of the facts, and Navajo believes that they are not supported by the evidence required for such decisions.

14. The effects on the environment as well as the effects on the federal parties and the location of the pipeline will be determined in large part by the NEPA process which will take a substantial amount of time.

15. In reliance on meetings with the BLM, Kirtland, and the USFS, Navajo has already spent almost a year and \$300,000.00 in pursuing this pipeline project. If the studies required by law preparatory to obtaining an ROW are not begun, then the project could be delayed even further, resulting in irreparable harm to Navajo.

16. There are two pipelines furnishing fuel to the Albuquerque and Santa Fe metropolitan areas (the "Metroplex"). Both of these pipelines are currently operating at capacity. If no additional pipelines are built to the Metroplex, it will suffer a fuel shortage which will have to be satisfied by truck.

17. The greater public interest and the welfare of the State and Kirtland favor putting a pipeline from Navajo's pipeline at Moriarty, New Mexico across federal lands to Kirtland and to the Navajo South Broadway terminal.

18. Navajo believes that in large measure the determination to deny Navajo a ROW across Kirtland and across USFS lands was dictated by the unwillingness of agencies of the federal government to fulfill federally mandated duties contrary to law, and that the denial of the ROW based upon administrative determination without proper studies denies Navajo due process of law.

19. The granting of a stay will only cause the government to have to comply with its mandated duties. The failure to grant a stay will result in immediate and irreparable harm to Navajo. [Stay denied on March 5, 1999.]

20. The actions of the BLM, Kirtland, and the USFS are arbitrary, capricious, and contrary to law and deny Navajo due process of law contrary to the Constitution of the United States.

21. Neither the USFS or Kirtland has responded to Navajo's request for information under the Freedom of Information Act, and there may be other reasons not yet known to Navajo why the request for ROW was denied. [BLM provided Appellant its 111-page casefile on the ROW request on December 29, 1998.]

(SOR at 1-4.)

EMRAP, a Tijeras, New Mexico citizens action group to which the Board granted Intervenor status in this case on March 18, 1999, filed a brief in

opposition (EMRAP Brief) to Appellant's request. EMRAP offers the following points in opposition to the award of an ROW to Navajo:

1. EMRAP represents the private landowners whose properties will be impacted by the passage of Navajo Refining Company's gasoline, jet fuel and diesel pipeline.
2. The National Transportation Safety Board, (NTSB), cites petroleum pipelines on its "10 Most Wanted" list for safety improvements.
3. Navajo Refining Company intends to run the proposed pipeline "the shortest distance between two points," as stated in their application for BLM right-of-way. The application also states that there will be no impact to the environment--this being determined by Navajo without the execution of any studies.
4. In New Mexico, pipeline companies are allowed to use land condemnation to acquire a right-of-way.
5. Navajo Refining Co. has maintained that the passage of this pipeline is for the good of the community yet public information indicates there is a race between refining companies to bring increased fuel capacity into Albuquerque.
6. Navajo Refining Co. maintains that existing pipelines into Albuquerque are at capacity, implying that new pipelines are needed. Yet, the addition of pumping stations on existing pipelines would increase capacity.
7. Navajo Refining Co. has been named in a \$1 Billion Anti-Trust suit filed by the Longhorn Partners Pipeline for conspiring to interfere with Longhorn's planned effort to pipe refined fuels into West Texas, New Mexico and Arizona.
8. Navajo Refining Company's selected route crosses a major watershed in an area with a fragile, fracture flow water system. Navajo representatives publicly refuse to wait for the completion of a watershed analysis of the area before proceeding with their project.
9. The route selected by Navajo Refining Co. is an area of significant seismic activity mostly occurring in small tremors but with occasional quakes in the range of Richter 3 to 5.5, increasing the danger of pipeline rupture.
10. Water resources are at a premium in the area of Navajo's selected route, and the aquifer is fragile. A single large gasoline spill could contaminate the area's water supply with carcinogenic benzines, rendering it unusable for years.

11. Navajo Refining Co. has been misleading the public and has attempted to circumvent the exercise of responsible action with respect to the environment and the parties that will be affected.

(EMRAP Brief at 1-2.)

On appeal, Appellant questions whether the Assistant Field Manager's Decision is based on significant public interest considerations. It disputes the merits of the Assistant Field Manager's recitation of USFS concerns that the proposed route is not an appropriate use for the area, that the proposed route constitutes a violation of established Forestwide Standards and Guidelines that provide direction to designate existing oil and gas transmission ROW's as corridors, and that the proposed ROW is not within an existing corridor and as such would require an amendment to the Forest Plan. Appellant also disputes the Air Force claims that the proposal is incompatible with their mission and would create unnecessary risks to their operations. The question is whether BLM properly denied that application. We conclude that it did.

[1] As the authorized representative of the Secretary of the Interior, BLM has the discretion to accept or reject an ROW application for an oil and gas pipeline under section 28(c)(2) of the Mineral Leasing Act of 1920 (MLA), as amended, 30 U.S.C. § 185(c)(2) (1994). The MLA clearly provides that, where the surface of Federal lands crossed by a proposed pipeline is under the jurisdiction of two or more Federal agencies, the Secretary of the Interior is authorized to grant or deny the ROW. Id. This is true even where none of the land involved is under the jurisdiction of the Department of the Interior, as in the present case. In such cases, however, an ROW through a Federal reservation shall not be granted if the head of any Federal department or independent Federal office or agency, other than the Secretary of the Interior, which has jurisdiction over the Federal lands, "determines that it would be inconsistent with the purposes of the reservation." 30 U.S.C. § 185(b)(1), (3) (1994).

[2] The burden is on Appellant, as the party challenging BLM's decision, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. Southern Utah Wilderness Alliance, 128 IBLA 382, 390 (1994). The Department is entitled to rely on the reasoned analysis of its experts in matters within their realm of expertise. King's Meadows Ranches, 126 IBLA 339, 342 (1993), and cases there cited. Thus, where BLM has evaluated the feasibility of the pipeline project proposed by Appellant, and has considered the objections of the Federal property managers responsible for the use and protection of the Federal lands involved, based upon the purposes for which that land is designated, it is not enough that Appellant offers a contrary opinion. In order to prevail, Appellant must demonstrate by a preponderance of the evidence that BLM erred in evaluating the data provided in reaching its conclusions. King's Meadows Ranches, supra at 342.

To determine whether a BLM decision rejecting an ROW application was based on a reasoned analysis of the facts and was made with due regard for the public interest, the Board looks to the agencies that are impacted from the proposal and their review of the proposal in light of the purposes for which the land they administer is dedicated. In this case, BLM determined that the project was not supported by those agencies with responsibility for the lands involved because it was not consistent with those purposes.

As set forth above, the controlling agencies' evidence of violation of purpose, and not the unsubstantiated requirement for an additional pipeline claimed by Appellant, must control the decision whether to accept or reject an application for an ROW across Federal lands. That authority is exercised where, as here, a BLM officer issues a decision with right of appeal to this Board. Appellant's reliance on unsupported claims of local need for the pipeline does not establish that the Assistant Field Manager erred in rejecting the application, where the Assistant Field Manager's determination was based on the consideration of input from all sources, including contrary information from one of the very constituencies (e.g., the Air Force) which Appellant contends the pipeline would serve. In fact, Appellant can show no support from State or Federal authorities, or from the local population.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur.

John H. Kelly
Administrative Judge

